Filed 2/25/14 In re A.C. CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

In re A.C., et al., Persons Coming Under the Juvenile Court Law.	
SAN BERNARDINO COUNTY CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. G.C., Defendant and Appellant.	E057912 (Super.Ct.Nos. J246060, J246061 & J246062) OPINION

APPEAL from the Superior Court of San Bernardino County. Gregory S. Tavill, Judge. Affirmed.

Joanne D. Willis Newton, under appointment by the Court of Appeal, for Defendant and Appellant.

Konrad S. Lee, under appointment by the Court of Appeal, for Minors.

Jean-Rene Basle, County Counsel, Regina A. Coleman, Deputy County Counsel, for Plaintiff and Respondent.

In this appeal, we are called upon to determine whether the juvenile court possesses the authority to amend a dependency petition to include allegations of serious physical abuse over the objection of the county child welfare services department. Assuming that we conclude the court has such authority, we are asked to determine whether there is sufficient evidence to support the additional allegations, and whether the court prejudged the issue by indicating it did not believe a parent's testimony prior to the close of evidence.

I. PROCEDURAL BACKGROUND AND FACTS

The parents are from Mexico; however, their three children, B.C. (born 2004), J.C. (born 2009), and A.C. (born 2011), were born in the United States. Following the birth of their third child, B.C. (Father) returned to Mexico to find work and a place to live. G.C. (Mother) remained in California because A.C. had undergone a heart transplant and the doctor advised keeping him for observation for at least one year following the procedure.

On August 30, 2012, Mother brought A.C. to the hospital with a left parietal skull fracture and a left frontal subarachnoid hemorrhage. Mother claimed that he fell off the sofa and hit his head a week prior to going to the hospital. Dr. Shankel concluded the injury appeared nonaccidental. A skeletal survey was performed; however, no other injuries were noted. On September 7, 2012, Dr. Young confirmed the skull fracture but recommended more testing to completely rule out other injuries. On September 16, 2012, while still in the hospital, A.C. was being examined for a procedure when two rib fractures in the healing stages were noted. Four days later, Dr. Young ruled the rib

fractures to be suspicious, and another unknown and unexplained injury was found. That same day, San Bernardino County Children and Family Services (CFS) took the children into protective custody and informed Mother. While A.C. remained in the hospital, the two older children were placed in a foster home.

On September 24, 2012, dependency petitions were filed under Welfare and Institutions Code[1] section 300. A.C.'s petition alleged that he had suffered serious physical harm inflicted nonaccidentally by a parent and/or as a result of the parent's failure to protect, under subdivisions (a) and (b) of section 300. The petitions relating to the older children alleged risk of abuse or neglect due to abuse of a sibling under subdivision (j) of section 300.

At the detention hearing on September 25, 2012, the court ordered out-of-home detention for all three minors, supervised visitation, and reunification services pending development of a case plan. The court stated that CFS was to give notice that this might be a case in which reunification services would not be provided.

In the jurisdiction/disposition report filed on October 11, 2012, CFS recommended family reunification services. Father had not yet been located. Mother was interviewed, and she tearfully denied hurting A.C. but admitted responsibility for him being hurt since the injuries occurred while he was in her care. She reported two incidents where A.C. had hit his head—once in July 2012 when he fell off the bed, and once more in August 2012 when he fell back while dancing. Mother did not know how A.C.'s rib injuries

[1] All further statutory references are to the Welfare and Institutions Code, unless otherwise indicated.

occurred but reported that about one month before she took him to the emergency room, J.C. had jumped into A.C.'s crib and landed on him. She also believed that A.C.'s ribs may have been injured while he was in the hospital because it was almost three weeks from the date of his admission before those injuries were noticed. She described how she and a nurse had once had to hold him down, as he was very aggressive and combative during a procedure to insert an intravenous tube into his arm.

According to a police report attached to the jurisdictional/dispositional report, police officers interviewed Mother twice and believed she was telling the truth when she reported not knowing how A.C. had obtained his injuries. Detective Binks did not recommend forwarding the case to the district attorney's office and no arrest was made.

The oldest child, B.C., was interviewed on October 10, 2012. She did not disclose any abuse in the home and described Mother as loving and attentive. B.C. did disclose that Mother had an adult male friend, Adrian, who was in the home when Mother noticed A.C.'s head injury. According to B.C., Adrian was holding A.C., who began to cry when Adrian touched A.C.'s head. B.C. did not see anyone hurt A.C. and she confirmed Mother's story that A.C. had fallen off the bed while Mother was in the kitchen.

The social worker opined that Mother was truthful about being ignorant as to how A.C. was injured; that she acted appropriately upon learning that A.C. was in distress by taking him to the hospital; and that she would have taken him sooner if she had known he needed immediate medical attention. The social worker continued: "Based on the history of care that the mother has provided for the children it is also clear that the mother has been providing appropriate care for the children. The mother has [no] history of CFS

involvement and no prior criminal history. It is the undersigned's professional opinion that with services this mother can benefit and eventually care for her children again."

On October 16, 2012, the matter was set for a contested jurisdictional/dispositional trial. The juvenile court informed Mother that it was possible reunification services would not be offered.

On November 26, 2012, at a pretrial conference, Father appeared for the first time. Minors' counsel informed the court that she was going to be contesting the recommendation that family reunification services be provided to Mother. CFS affirmed it was still recommending services for both parents.

A contested jurisdictional/dispositional hearing began on December 3, 2012, and concluded as to jurisdiction on December 17. The dispositional hearing was continued. The court admitted CFS's reports into evidence. Included in the reports was the medical report of A.C. prepared by Dr. Young, wherein the doctor noted, "No credible history of accident has been offered to explain the extent and severity of [A.C.'s] injury." Father did not offer any affirmative evidence, and Mother indicated she was not contesting the jurisdiction allegations or disposition recommendations but reserved the right to argue and present evidence if the recommendation that reunification services be offered to Mother was changed.

Minors' counsel called Mother as a witness. Mother testified that her adult brother had been living with her and the children but Father had not because he had been living in Mexico since March 2012. Mother claimed she never left the children alone with her brother or asked him to watch them. She admitted that she had "[sold] food" to Adrian in

August 2012. She dated him and he would visit almost daily. Later, she admitted having a romantic relationship with Adrian; however, she claimed that she broke it off and he accepted the breakup. Mother denied ever leaving A.C. alone with Adrian.

Mother testified that she first noticed A.C.'s head injury on a Tuesday night when he was being held by Adrian while she was cooking. She touched one side of A.C.'s head and noticed that it was softer than the other. Because he already had an appointment scheduled for Thursday morning, she waited until the appointment to speak to a doctor about it. Mother had not thought it was serious, and A.C. had no signs of being ill until he started running a fever on Wednesday night. She denied any knowledge of how A.C. was injured. She speculated it could have occurred when her daughter B.C. was watching him while she did the wash outside in the apartment complex or cooked in the kitchen. However, she maintained that no one but B.C. ever watched A.C.

According to Mother, A.C. had heart surgery when he was seven days old. She sent her two older children to Mexico while she stayed with A.C. at the hospital for three months. She cared for him after his release and took him to all of his medical appointments. She knew when he was sick because he would not want to eat, he cried, or he started running a fever. She testified that he did not exhibit any signs of pain from his head or rib injuries except when she touched his head, he seemed to not want to be touched.

Social worker Danielle Moore testified. According to Moore, Mother did not mention Adrian until after B.C. mentioned him in her interview. Mother had not previously disclosed any romantic relationship with Adrian. When asked if Adrian could

have caused A.C.'s injuries, Mother claimed he could not. Moore believed that Mother did not know how A.C. was injured; however, she opined that with therapy, Mother might be able to open up and realize the source of the injuries. Moore later stated that with therapy, one of two things could happen—either Mother would uncover knowledge of what happened, or she would learn to be more protective, a more appropriate caregiver. Moore did not believe Mother was being evasive or trying to cover up for someone, nor did she believe that Mother caused A.C.'s injuries. Mother accepted responsibility that A.C. was hurt under her care and took A.C. to the emergency room immediately after being advised to do so by A.C.'s heart doctor.

Moore observed Mother's visits with the children, describing them as "very bonded" to her. Her interaction with A.C. was "very protective." Mother participated in A.C.'s followup medical visits. B.C. wanted to return to Mother and Moore believed that J.C. did as well. B.C. never described any abuse in the home. Moore opined that all three children were well taken care of by Mother.

According to Moore, Mother would benefit from services despite the severity of A.C.'s injuries. She based this opinion on Mother's lack of any abuse/neglect referrals in the past; her history of providing appropriate care for the children; the fact that B.C. and J.C. are "extremely bonded" to Mother; and the fact that she would continue to be part of the family regardless of whether she was offered services.

At the close of evidence, minors' counsel asked the court to conform the petitions to proof. As to A.C.'s petition, counsel sought to amend the section 300, subdivisions (a) and (b) allegations to include injuries to three ribs. Counsel also sought to add an

allegation under subdivision (e) of section 300 to read the same as the subdivision (a) allegation.[2] Mother's counsel, along with CFS, objected to the addition of the section 300, subdivision (e) allegation. Reserving ruling on the issue, the juvenile court asked for briefing whether CFS was the only party who could amend the petition.

On December 17, 2012, the court heard additional argument on minors' counsel's motion to amend A.C.'s section 300 petition. Concluding that it had such authority, the court granted minors' request. The parties were offered the opportunity to reopen the case and present new evidence in regard to the new section 300, subdivision (e), allegation; however, the court clarified, "the E allegation as read by the Court, I believe is the current state of the evidence, the Court's finding with that is true." Mother's counsel requested a continuance to call Mother's therapist, otherwise, she reiterated that she had no new evidence to present because Mother did not know what had happened to cause A.C.'s injuries.

At the conclusion of the hearing, the court bifurcated the disposition phase and granted Mother's request for a continuance. As for the jurisdiction phase of the hearing,

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[2] Section 300, in relevant part, provides: "Any child who comes within any of the following descriptions is within the jurisdiction of the juvenile court which may adjudge that person to be a dependent child of the court: [¶] . . . [¶] (e) The child is under the age of five years and has suffered severe physical abuse by a parent, or by any person known by the parent, if the parent knew or reasonably should have known that the person was physically abusing the child. For the purposes of this subdivision, 'severe physical abuse' means any of the following: any single act of abuse which causes physical trauma of sufficient severity that, if left untreated, would cause permanent physical disfigurement, permanent physical disability, or death; . . . or more than one act of physical abuse, each of which causes bleeding, deep bruising, significant external or internal swelling, bone fracture, or unconsciousness . . . ." (§ 300, subd. (e).)

the court made true findings on the allegations in the petitions, as amended, under subdivisions (a), (b), and (e) of section 300, as to A.C. It also made true findings under subdivision (j) of section 300, as to B.C. and J.C.

The contested dispositional hearing was held on January 16, 2013. The court announced its intent to consider the testimony provided at the contested jurisdictional hearing, to the extent that such evidence was relevant to the dispositional issues.

Mother's counsel called Javier Campos, Mother's counselor with Catholic Charities. Campos testified that he began seeing Mother on November 17, 2012, and had seen her for seven sessions. He believed that while Mother did not know how A.C. was injured, she neither minimized the injuries nor denied they had occurred. Mother was learning how to better protect her children and had acquired new parenting skills. He believed she had benefited from her sessions and would continue to benefit from the five remaining ones.

Social worker Moore testified that the parents' weekly visitation with the children was going well. She stated that Mother's reunification services, if provided, would include counseling and parenting. She opined that such services would help prevent re-abuse or neglect, as Mother would learn how to properly supervise and attend to the children. She also believed Mother would likely be successful with her reunification plan. Moore reiterated the children were bonded to Mother and that denying reunification services to her would be detrimental to the children.

In closing argument, all parties with the exception of minors' counsel supported CFS's recommendation that reunification services be offered to Mother. The court

removed the children from both parents' custody and ordered CFS to provide services. However, the court made the following observation: "I'm very critical of the mom in this case. I think the mom is very selfish in this case. She chose herself. She chose her friend over her children. [¶] Mom is hard to read, you know. She sits here with no emotions, stone cold. [¶] The social worker testified that there is a bond, that there's a loving relationship between the mom and the kids. That testimony is uncontroverted. [¶] I think in some ways the problem with this case has a lot more to do with the coverup, Mom's refusal to be candid and honest for whatever illogical reason that is. [¶] I think the social worker's analysis that the mom will be a continuing part of the children's lives is a significant factor, and it is a persuasive factor, and it is persuasive to the Court. [¶] And for the benefit of all the children, we are better off providing services. In the Court's view, the mom is messed up. So we can try to improve that, or we can leave it alone. I think the social worker's idea under the circumstance to try to improve that is the better choice."

II. THE JUVENILE COURT'S AUTHORITY TO ORDER THE DEPENDENCY PETITION AMENDED OVER OBJECTION OF CFS

Both Mother and CFS contend that only CFS possesses the authority to add a section 300, subdivision (e) allegation, and thus, the juvenile court erred in doing so over CFS's objection.

Here, the initial petition alleged that A.C., "[w]hile in the care and custody of [his] mother . . . received an unexplained skull fracture and three fractured ribs." It further alleged the "unexplained injuries . . . resulted in the child being hospitalized." However,

at the time of the detention hearing, the juvenile court questioned the cause of A.C.'s injuries which required the initiation of dependency proceedings. A contested jurisdictional/dispositional hearing was set and the Children's Advocacy Group (CAG) appeared on behalf of the children. CAG informed the court and the parties that it would be contesting the recommendation of reunification services for Mother.

A contested hearing was held on December 3, 2012, and evidence was introduced. At the conclusion, CAG asked that the court "conform to proof by adding or including E-9 allegation to read the same as the A-1." CAG further added: "As to the recommendation for reunification services for the mother, we are not in agreement with that and would ask that the Court not order reunification services for the mother pursuant to [section] 361.5[, subdivisions] (b)(6) and (b)(5) if the Court conforms the petitions as we're requesting. [¶] I believe, even after the testimony today, we're no closer to knowing what happened to [A.C.] as we were at the date of the detention. [¶] The mother has no information for the Court to give any inkling of information as to how this little child was severely injured. [¶] Clearly, a skull fracture and three broken ribs to a child that is under three years old is severe physical abuse. [¶] The mother has testified today and the social worker's report confirmed that the mother was the only adult caretaker of the children during the time that the injuries occurred." CFS and Mother opposed the addition of the section 300, subdivision (e), allegation; however, the juvenile court agreed with CAG and concluded that the evidence supported an amendment to the dependency petition. The court asked the parties to brief the issue of whether the petition could be amended over CFS's objection. After receiving the parties' briefs and hearing

further argument, the court concluded that it had the "authority to act in the best interest of the children" and amend the petition. It entered its jurisdictional order and continued the dispositional hearing to allow the parties to present further evidence. Both Mother and CFS challenge the juvenile court's actions.

Initially, we note that it is within the social services department's discretion to file a dependency petition alleging that a child comes within the juvenile court's dependency jurisdiction. (§ 325; Cal. Rules of Court, rule 5.520(a) & (b).) However, any person may apply to the social services department to commence proceedings in juvenile court. (§ 329; Cal. Rules of Court, rule 5.520(c).) Once such person has submitted the proper documentation and the social services department decides not to initiate dependency proceedings, the person may seek review by the juvenile court of the department's decision. (§ 331.)

Moreover, Welfare and Institutions Code section 348 authorizes the juvenile court to amend the dependency petition to conform to proof in accordance with Code of Civil Procedure section 469 et seq. Code of Civil Procedure section 469 provides: "No variance between the allegation in a pleading and the proof is to be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. Whenever it appears that a party has been so misled, the Court may order the pleading to be amended, upon such terms as may be just." "Given the haste with which petitions are sometimes drafted," and the fact that only a "'concise statement of facts'" is necessary, "the ability to amend according to proof plays an important role in the overall dependency scheme." (*In re Jessica C.* (2001) 93

Cal.App.4th 1027, 1041 [court erred in refusing to allow an amendment to conform to proof, thereby prejudicing the children]; Welf. & Inst. Code, § 342.) "[A]mendments to conform to proof are favored, and should not be denied unless the pleading as drafted prior to the proposed amendment would have misled the adversarial party to its prejudice. [Citation.]" (*In re Jessica C., supra,* at p. 1042.)

We are mindful that the goal of dependency is to protect the children, not to punish the parents. (*In re Richard H.* (1991) 234 Cal.App.3d 1351, 1362; *In re La Shonda B.* (1979) 95 Cal.App.3d 593, 599.) As such, the county social services agency may not unilaterally dismiss a dependency petition when the children object. Instead, the children have the right to present evidence and require the court to determine whether they are described under section 300. (*Allen M. v. Superior Court* (1992) 6 Cal.App.4th 1069, 1074; *Taylor M. v. Superior Court* (2003) 106 Cal.App.4th 97, 107.) Here, on behalf of the children, CAG presented evidence that supported the section 300, subdivision (e), allegation. While both CFS and Mother opposed amending the petition to include a section 300, subdivision (e) allegation, the above statutory and case law clearly empower the juvenile court to allow such amendment when sufficient evidence is presented. Thus, the juvenile court acted within its authority when it considered the evidence presented by CAG and, over CFS's objection, concluded that the dependency petition should be amended.

Furthermore, the addition of the section 300, subdivision (e) allegation did not violate Mother's due process rights because her acts, which supported the newly added allegation, were the same as those that supported the section 300, subdivision (a) and (b)

allegations. Also, Mother suffered no harm as a result of the amendment because (1) she was put on notice that the juvenile court would consider adding the allegation if the facts supported doing so, and (2) when it was added to conform to the proof, Mother was offered time to prepare a response to the new allegation. As Mother points out, the major implication of a section 300, subdivision (e) finding is the possibility that she would be denied reunification services. There is no doubt this is a serious consequence. However, the court ultimately agreed with CFS's recommendation and ordered that reunification services be provided to Mother.

III. SUFFICIENCY OF EVIDENCE

Mother contends there was no substantial evidence to support a section 300, subdivision (e) allegation. We disagree.

In order to sustain an allegation under section 300, subdivision (e), it is not necessary that the identity of the abuser be known or that the parent had actual knowledge of the child's abuse when the child was never out of the parent's custody. Rather, it is sufficient to show that the parent reasonably should have known of the abuse. (*In re E. H.* (2003) 108 Cal.App.4th 659, 670.) While Mother claims she did not harm A.C., nor does she know how he was harmed, the fact remains he was 16 months old when he suffered a nonaccidental skull fracture along with three rib fractures while in Mother's care. Mother admitted she never left A.C. with anyone, including her adult brother who lived with her. Whether or not Mother had actual knowledge, she reasonably should have known how A.C. was injured. "[W]here there is no identifiable perpetrator, only a cast of suspects, jurisdiction under subdivision (e) is not automatically

ruled out. A finding may be supported by circumstantial evidence as it is here. Otherwise, a family could stonewall the Department and its social workers concerning the origin of a child's injuries and escape a jurisdictional finding under subdivision (e)." (*Ibid.*)

More importantly, the juvenile court did not find Mother to be a credible witness. (*In re Y.G.* (2009) 175 Cal.App.4th 109, 113 [court found mother's testimony not credible and that she harmed her child].) According to the evidence presented at both the jurisdictional and dispositional hearings, we conclude that sufficient evidence supports the section 300, subdivision (e) allegation.

IV. DID THE JUVENILE COURT PREJUDGE THE ISSUE?

Mother claims the juvenile court "indicated early on that it had prejudged the case and determined the mother to be at fault for A.C.'s injuries before the jurisdictional trial." She argues the court shifted the burden of proof, requiring her to prove that she had not injured A.C.

On October 16, 2012, the initial date for the jurisdictional/dispositional hearing, CAG noted it was putting "all parties on notice that we may be contesting the recommendation." In response, the court stated: "Based on what I have right now, I'm contesting it right now. I need more information. I'm not going to prejudge it, but certainly what is described in the report, it's lacking. And the injuries are concerning to the Court. And the cause of the injury is unclear. And the mother is the one who has the ability to explain the injuries." Later, at the pretrial appearance, the court questioned whether the treating doctor would be testifying and asked if there was "any more

information as to what happened to this child . . . ." Because the court had only the social worker's reports to refer to, it noted that Mother's explanation "does not make any sense." Later, at the jurisdiction hearing, the court heard from Mother and the social worker and observed that "given the evidence, [it] would find the E allegation true." The court found the "only evidence right now . . . points to the mom as the perpetrator."

On appeal, Mother argues "there was no evidence that [she] injured A.C. or that she reasonably should have known that someone else had done so. The social worker, the police and [her] therapist all believed that she had no knowledge of how A.C. was injured." The flaw in Mother's argument is her failure to acknowledge her testimony that she never allowed anyone else to take care of A.C. At most, Mother claimed her eldest daughter watched A.C. while Mother was cooking or doing laundry. Clearly, given Mother's claim that she was the sole caregiver for A.C., she reasonably should have known about his injuries. As previously stated, a finding under section 300, subdivision (e) requires only that the parent reasonably should have known of the abuse. (*In re E. H.*, *supra,* 108 Cal.App.4th at p. 670.)

Given Mother's claim of ignorance of A.C.'s injuries, the trial court's comments amounted to nothing more than its opinion of the state of the evidence. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1111-1112 ["Mere expressions of opinions by a trial judge based on actual observation of the witnesses and evidence in the courtroom do not demonstrate a bias"], overruled on other grounds in *People v. Rundle* (2008) 43 Cal.4th 76, 151.) Initially, the court questioned whether Dr. Young had been questioned about the chronology of A.C.'s injuries, and whether anyone had talked to A.C.'s sibling that

was old enough. Later on, the court noted the evidentiary problems in the case, namely, Mother's failure to disclose the presence of Adrian or that A.C. was in his hands when the head injury was first noted. The court observed that a broken skull and ribs are "more than just an accident." Even after Mother testified, she offered no further explanation for A.C.'s injuries. Thus, the court rightly observed the evidence supported amending the petition to include a section 300, subdivision (e), allegation. Nonetheless, the court bifurcated the disposition hearing from the jurisdiction hearing and allowed Mother another opportunity to present further evidence that would support a decision to grant her reunification services. After hearing such evidence, the court agreed with CFS and ordered reunification services for Mother. We conclude the juvenile court did not prejudge the case, but took actions deemed necessary given the state of the evidence.

V. DISPOSITION

The order appealed from is affirmed.

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HOLLENHORST
J.

We concur:

RAMIREZ
P.J.

MCKINSTER
J.